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In the Supreme Court of the United States

OCTOBER TERM, 1974

THE RENEGOTIATION BOARD, PETITIONER

v.

GRUMMAN AIRCRAFT ENGINEERING CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1A-24A) is reported at 482 F. 2d 710. The opinion of the district court (Pet. App. C, pp. 26A-41A; A. 205-219) is reported at 325 F. Supp. 1146.

JURISDICTION

The judgment of the court of appeals was entered on July 3, 1973 (Pet. App. A, p. 1A). The Board's timely petition for a rehearing *en banc* was denied on September 27, 1973 (Pet. App. B, p. 25A). On January 17, 1974, the Chief Justice extended the time for filing a petition for a writ of certiorari to Febru-

ary 25, 1974. The petition was filed on that day and was granted on May 28, 1974. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Freedom of Information Act requires public disclosure of recommendations concerning the disposition of pending cases made to the members of an agency, where the agency decision reaches the same result as the recommendations but the agency does not issue any opinions explaining its decisions.[1]

STATUTE INVOLVED

The Freedom of Information Act ("FOI Act"), 5 U.S.C. 552, is set forth in the appendix to this brief, *infra*, pp. 41–44.

STATEMENT

1. THE RENEGOTIATION BOARD

The Renegotiation Act, 50 U.S.C. App. 1211, *et seq.*, states that the "sound execution of the national defense program requires the elimination of excessive profits from contracts made with the United States, and from related subcontracts." 50 U.S.C. App. 1211. It establishes the Renegotiation Board ("the Board"), composed of five members appointed by the President, with the consent of the Senate, as an independent agency in the Executive Branch to accomplish this objective. 50 U.S.C. App. 1217(a).

[1] This statement of the question varies slightly from its formulation in the petition; there is no change of substance, however.

As its name suggests, the Board operates primarily by informal negotiation with defense contractors[2] rather than by formal hearings;[3] the Board is directed to "endeavor to make an agreement with the contractor or subcontractor with respect to the elimination of excessive profits." 50 U.S.C. App. 1215(a). These negotiations are to be completed within two years; otherwise, "all liabilities of the contractor or subcontractor for excessive profits with respect to which such proceeding was commenced shall thereupon be discharged * * *." 50 U.S.C. App. 1215(c).

Where the Board and the contractor are unable to agree upon the amount of excessive profits, the Board may determine these profits by issuing a unilateral order. 50 U.S.C. App. 1215(a). The contractor may then initiate proceedings in the Court of Claims to determine its indebtedness to the United States. Such a proceeding is "not * * * treated as a proceeding to review the determination of the Board, but * * * [is] treated as a proceeding *de novo.*" 50 U.S.C. App. 1218.

2. RENEGOTIATION PROCEDURE[4]

In order to assist the Board in processing the large volume of cases it handles (A. 178), the agency, pur-

[2] See *Renegotiation Board* v. *Bannercraft Clothing Co., Inc.*, 415 U.S. 1.

[3] The Board is exempted from the requirements of the Administrative Procedure Act, except for the Public Information section thereof. 50 U.S.C. App. 1221.

[4] The renegotiation procedure set forth below was in effect at the time this case arose. Since that time, the Board has twice made substantial changes in its procedure. Such changes were made by amendments to the Board's regulations published at 37

suant to statutory authorization, 50 U.S.C. App. 1217 (d), has created two regional boards, see 32 C.F.R. 1451.32 (1972), composed entirely of civil servants. A. 178. In Class A cases, *i.e.*, those in which renegotiable profits are more than $800,000, A. 77,[5] the regional boards are authorized only to make recommendations to the Board concerning the amount, if any, of excessive profits.[6] Only Class A cases are involved here.[7] Pet. App. A, p. 3A.

Every contractor subject to the Renegotiation Act, whose receipts for the fiscal year exceed the applica-

Fed. Reg. 20690–20693 (October 3, 1972), 37 Fed. Reg. 24108–24112 (Nov. 14, 1972), and 39 Fed. Reg. 13549–13550 (April 15, 1974). The effect of these amendments on the procedure set forth in the text is footnoted.

[5] 32 C.F.R. 1471.2(b) (1972); currently in 32 C.F.R. 1471.2 (b) (1973).

[6] 32 C.F.R. 1473.2(a), 1474.3(a), 1475.3(a) (1972); currently in 32 C.F.R. 1473.2(a), 1474.3(b), 1475.3 (1973).

[7] Prior to the 1972 amendments, in all Class B cases, *i.e.*, those in which renegotiable profits are $800,000 or less, the regional boards were delegated the authority to issue orders determining the amount, if any, of renegotiable profits, 50 U.S.C. App. 1215(a), if agreement was not reached with a contractor. 32 C.F.R. 1471.2(b) (1972). An order of the regional board determining excessive profits could be reviewed by the Board, either on its own motion or at the request of the contractor. 50 U.S.C. App. 1217(e). Since virtually all regional board orders determining excessive profits in Class B cases were reviewed by the Board, the delegation of authority to the regional boards was amended in 1972 to eliminate their right to issue such orders in Class B cases. 32 C.F.R. 1475.3 (1973).

Under both the former and current procedures, an order of the regional board in a Class B case finding that there are no excessive profits (a "clearance") or an agreement with the contractor as to the amount of excessive profits is not reviewable by the Board.

ble jurisdictional amount, is required to file a financial statement with the Board. 50 U.S.C App. 1215 (e), (f). The statements are reviewed by the Board's staff to determine whether there is any possibility that the contractor realized excessive profits. If such possibility exists, the case is assigned to a regional board, usually on a geographical basis (A. 77).

A. PROCEEDINGS BEFORE THE REGIONAL BOARD

Cases assigned to a regional board are typically assigned to a team composed of an accountant and a renegotiator.[8] *Ibid.* This team meets with the contractor, secures relevant information, and prepares a report and recommendation to the regional board. *Ibid.* Prior to the 1972 amendments, this report was called a "Report of Renegotiation," and consisted of Part IA, prepared by the accountant, and Part II, prepared by the renegotiator.[9]

[8] A regional board member previously could serve as a renegotiator. A. 178. Under the Board's current regulations, a renegotiator cannot be a regional board member. 32 C.F.R. 1472.3(d) (1973).

[9] Under the 1972 amendments to the regulations, preparation of the Report of Renegotiation was discontinued. In its place, the accountant prepares an "Accounting Report" and the renegotiator prepares a "Renegotiation Report." 32 C.F.R. 1472.3 (e) and (i) (1973). The "Accounting Report" is furnished to the contractor in all cases in which it is prepared; the "Renegotiation Report" is furnished to the contractor in those cases in which the renegotiator recommends a finding of excessive profits. In cases in which a clearance is recommended, the renegotiator prepares a report called a "Clearance Recommendation," 32 C.F.R. 1472.3(f) (1973), or the accountant and renegotiator together prepare a single report called a "Clearance Notice Report," 32 C.F.R. 1472.3(g) (1973). In these instances none of these documents are furnished to the contractor.

A typical Part IA was described by Mr. Lawrence E. Hartwig, the former Chairman of the Renegotiation Board, as containing various financial and accounting information. A. 143–144. Mr. Hartwig's deposition explained that Part II of the Report "is the renegotiator's evaluation and recommendation to the Regional Board." "This is an intra-agency communication by the Renegotiator to his superiors, namely the Regional Board." A. 77, 194. A typical Part II was described as follows, A. 95:

> * * * [T]here is Subheading A, Sources of Information. B, Application of Statutory Factors. One under that. Character of Business. Two under that, Capital Employed. Three, extent of risk assumed. Fourth, contribution to the defense effort. Five, efficiency. Six, reasonableness of costs and profits.
>
> A under that, costs.
>
> B under that, pricing.
>
> C, profits. And then a large C, capital C, entitled "Special Matters", and then a Capital D, Conclusion and Recommendation.

The Part IA was furnished to the contractor at his request; the Part II was not so furnished. A. 145, 179–180.

Prior to the 1972 amendments, in cases in which the staff team recommended a determination of excessive profits, the regional board considered such recommendation and made a tentative decision concerning the amount, if any, of excessive profits.[10] 32 C.F.R.

[10] The tentative determination or recommendation of excessive profits was eliminated from Board procedures by the 1972 amendments.

1472.3(e) (1972). Thereafter, the contractor was afforded an opportunity to meet first with the staff team and then, if requested, with a panel composed of one or more members of the regional board. 32 C.F.R. 1472.3 (f) and (h) (1972).[11] The staff team or the panel, if one was designated, submitted to the regional board its recommendation concerning the amount of excessive profits, if any, realized by the contractor.

In Class A cases, under both current and former procedures, the regional board considers the report and the recommendation of the staff team or of the panel, if one was appointed, and makes its own recommendation as to the amount, if any, of excessive profits realized by the contractor. A. 78. If the regional board agrees with the staff or panel recommendation, the report is signed by the chairman of the regional board, A. 127, but this does not signify approval of any portion of the report other than its recommendation, A. 78. If the regional board's recommendation is different from the staff or panel recommendation, an addendum to the staff report is prepared reflecting the action of the regional board.

Prior to the 1972 amendments, in those cases in which the regional board recommended a determination that the contractor realized excessive profits, the contractor could request a "Summary of Facts and

[11] While the regional board no longer makes tentative determinations of excessive profits, the opportunity to meet with the staff and a panel prior to the regional board's determination of excessive profits has been preserved. 32 C.F.R. 1472.3 (j) and (l) (1973).

Reasons"[12] explaining the reasons for the regional board's recommendation. These summaries were available to the public. A. 213; 32 C.F.R. 1480.5(a) (1972); 32 C.F.R. 1480.5(a)(16) (1974).

B. PROCEEDINGS BEFORE THE STATUTORY BOARD

The recommendation of the regional board is then submitted to the Board.[13] A. 78. The procedure followed by the Board upon receipt of the recommendation was described by Chairman Harwig (A 78–79) as follows:

> The [regional board] report, then, with the case file comes up to headquarters for review, because the Statutory Board has reserved to itself authority to conclude those cases. * * * [I]t is first sent to the Office of Accounting, which prepares an accounting memorandum addressed to the Office of Review, in which it comments upon the accounting, the figures, and indicates whether in its opinion the Regional Board accountant, his recommendation, has been satisfactory.
>
> Assuming that to be so, then the Office of Review will look at the recommendation of clearance and it will assign a reviewer to the case. And the reviewer will indicate then by way of recommendation to the—to the Board whether he concurs or disagrees with the Regional Board's recommendation.
>
> And the Director of the Office of Review will also indicate whether he agrees or disagrees with the recommendation of the Regional Board.
>
> So that when the case then comes up to the Board on its agenda, the papers have previously been circulated to the Board members for study.
>
> All the staff's recommendations have been circulated for study by the individual Board members. Each one will conduct his own independent study. Each one has an assistant who himself may look at the case file and look at the underlying documents for the purpose of advising that Board member.

Prior to the 1972 amendments, when the regional board recommended a clearance or an agreement with the contractor and the Board agreed with that recommendation, it returned the case to the regional board for the preparation or execution of the necessary documents. 32 C.F.R. 1473.2(a) and 1474.3(a) (1972).[14]

[12] A Summary of Facts and Reasons was issued to the contractor to assist it in deciding whether to enter into an agreement on excess profits. 32 C.F.R. 1477.3 (1972). In 1972, the Board amended its regulations to provide that, at this point in the proceedings, the regional board would issue a "Memorandum of Decision" to every contractor which had not theretofore indicated its willingness to enter into an agreement. 32 C.F.R. 1477.3 (1973). In 1974, the regulations were again amended to provide that, at this point, the regional board would issue a "Proposed Opinion" to every contractor which it found to have realized excessive profits and which has not theretofore indicated its willingness to enter into an agreement. 32 C.F.R. 1477.3(a) (1974).

[13] Under the 1974 amendments the regional board furnishes the contractor with a "Regional Board Opinion" at the same time its final recommendation is submitted to the Board. 32 C.F.R. 1477.3(c) (1974). In Class B cases concluded by the regional board pursuant to its delegated authority, the regional board furnishes the contractor with a "Final Opinion." 32 C.F.R. 1477.3(b) (1974). Regional Board Opinions and Final Opinions are available to the public. 32 C.F.R. 1480.5(a) (17) and (18) (1974).

[14] In recognition of the fact that the Board had not delegated authority to the regional boards to issue clearances in Class A cases and that, in reality, the clearances were issued by the

Under both the former and current procedures, other cases, where the Board does not agree with a recommendation of a clearance or agreement or where the contractor does not agree with an excessive profit recommendation, are generally referred to a division of the Board composed of three of the five members. 32 C.F.R. 1472.4 (1972). The division reviews the case, conducts meetings with the contractor and attempts to reach an agreement. *Ibid.* After the division completes its review, it prepares a report which is submitted, along with the other components of the file, to the Board. 32 C.F.R. 1472.4(c) (1972); A. 81.

The Board then considers and after a discussion (which is not limited to matters included in the reports, A. 181), votes on the case. As Chairman Hartwig explained (A. 79):

> * * * [W]hen the recommendation clearance of the Regional Board comes up on the Board agenda, the Board simply approves or disapproves the clearance. It does not adopt any of the memoranda that are before it. It does not ratify or adopt any of these staff memoranda. It simply, in the exercise of its judgment, says it is a clearance or it isn't a clearance. And there is no Board-adopted document which you could call an opinion.

Board (see *e.g.* A. 77–79, 93, 193), the Board subsequently amended its regulations so as to provide for the issuance of a clearance by the Board in Class A cases when it agreed with the recommendation of a regional board. 32 C.F.R. 1472.2(a) and 1472.3 (1973).

Similarly, Chairman Hartwig testified that "when the Board adopts the recommendation of the Division, it does just that. It does not adopt the Division report. It adopts the conclusion. It adopts the conclusion or the recommendation, but not the report" (A. 81; see also, A. 180–181, quoted *infra*, pp. 14–15.

The actions of the Board are recorded in minutes of the Board meetings. A. 91. Those minutes are not verbatim statements of the discussion by the Board, but are simply a record of Board action. *Ibid.* In each case, the minutes simply state that the Board either approved or disapproved the "recommendation" of the Division before it. *E.g.*, A. 55, 169. The minutes also indicate any dissenting vote by a Board member from a Board action. A. 169.

The contractor is notified of the results of the Board's deliberations and, again, when the Board determines that the contractor realized excessive profits, he may request a "Summary of Facts and Reasons," [15] a document which is prepared anew and is not simply a summary of various memoranda in the files. A. 189. These summaries are available to the public. 32 C.F.R. 1480.5(a) (1972); 32 C.F.R. 1480.5 (a)(16) (1974).

If the contractor agrees with the Board's decision, an agreement is prepared and executed. 32 C.F.R. 1474.4 (1972). If the contractor is unwilling to agree, the Board issues an order determining the amount of

[15] The Summary of Facts and Reasons and later documents issued by the Board parallel the documents issued by the regional boards. See footnote 12, *supra*.

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excessive profits. 32 C.F.R. 1475.4 (1972).[16] In such a case the Renegotiation Act provides that the contractor can request a "Statement of Facts and Reasons" stating the basis for the Board's action.[17] A. 189. These statements are available to the public. 32 C.F.R. 1480.5(a)(3) (1972).

3. THIS LITIGATION

In April, 1968, the Board notified respondent, a government contractor, that the Board had determined that respondent had earned excessive profits of $7.5 million for the fiscal year which ended on December 31, 1965. A. 8.

In that same month, respondent requested certain documents from the Board in connection with this determination, including "the final opinions, determinations, unilateral orders, agreements, clearance notices and letters not to proceed" issued in Board proceedings concerning 14 other government contractors, as well as the "summaries of the facts and reasons upon which such final opinions, determinations, unilateral orders, and agreements [were based] * * *." A.9. The Board denied the request on the basis, *inter alia*, that the requested documents were exempt from

[16] Under the 1974 amendments, the Board furnishes the contractor with a "Final Opinion" at the same time as the order, agreement or clearance is issued. 32 C.F.R. 1477.3(b) (1974). Such Final Opinions are available to the public. 32 C.F.R. 1480.5(a)(17) (1974).

[17] 50 U.S.C. App. 1215(a); 32 C.F.R. 1477.2 (1972).

compelled public disclosure pursuant to Exemption 5 [18] of the Freedom of Information Act ("FOI Act").

Respondent then instituted this suit (A. 12, 16) under the FOI Act to compel the Board to disclose the documents. The district court granted the Board's motion for summary judgment. A. 51a.

The court of appeals reversed. A. 52–58. With respect to the documents relating to the 14 government contractors, the court held that Section 552(a)(2)(A)[19] of the FOI Act requires government agencies to make public their "final opinions, including concurring and dissenting opinions, as well as orders" after appropriate deletions to protect material exempt from disclosure pursuant to the Act. A. 53–55. The court, therefore, remanded the case to the district court to allow respondent access to the opinions and orders requested.

On remand, the Board disclosed a number of documents to respondents, including fifty-one "clearance" notices and two unilateral orders, issued in the cases of the fourteen contractors which had been the subject of respondent's FOI Act request. A. 206. The

[18] Exemption 5, 5 U.S.C. 552(b)(5), protects from compelled disclosure under the Act: "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

[19] That Section provides that:

> (2) Each agency, in accordance with published rules, shall make available for public inspection and copying—
>
> (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

Board also filed a motion for summary judgment with respect to the remainder of the documents. A. 59–69.

Respondent filed a motion for an order in accordance with the mandate of the court of appeals. A. 70–72. In this motion, respondent contended that the court of appeals had ruled that the Board was required to disclose all "opinions relating to fourteen named corporations," but that the Board had failed to disclose, *inter alia*, recommendations prepared by a division of the Board and reports by a regional board which resulted in a clearance. A. 70–71.

In order to support its contention that such documents were "final opinions," respondent sought to depose Lawrence E. Hartwig, Chairman of the Renegotiation Board. The district court thought that "[i]t is not clear * * * what constitutes in fact a *final* order and opinion" (A. 73) and, therefore, denied the Board's motion for a protective order. *Ibid.*

In his deposition, A. 74–204, Chairman Hartwig was questioned extensively about the procedures of the Board and the contents of the various Board files which related to the fifty-one clearance notices and two unilateral orders furnished to the respondent. Mr. Hartwig explained in detail why, even though the Board may reach the same result, the Board does not adopt or ratify division reports, or regional board reports, which accompany recommendations that a clearance be issued (A. 180–181):

> As a practical matter, as I think I said earlier, the Board would never get the job done as expeditiously as Congress intended for it to be done, if a Board agreement had to be

secured with respect to every report which is submitted to it. Another reason that the Board operates this way is that this is a judgemental type of operation where Board members may disagree with each other respecting the evaluation of a particular statutory factor; but, nevertheless, can agree on the decision. Frequently, it happens in Board discussions that one Board member will emphasize one factor more than another. Or, I know of instances where, upon review of a proposed clearance, an individual Board member might criticize the report of renegotiation because it omitted something. He may even question whether the recommendation incorporated in that report is sufficiently supported in the report itself.

But when he makes an independent examination of the file he may find, for example, a performance report which convinces him that the recommended clearance is appropriate, even though the particular renegotiator may not have commented favorably on the contractor's performance. This will simply illustrate how these cases come before the Board.

There may be a case where one Board member will consider that the clearances are justified, clearance is justified, in his own mind, because the overall costs are reasonable. Another Board member might not be impressed by that point, he may consider that perhaps the overall costs are not low costs, but simply reasonable costs, but be more impressed by the contribution to the defense effort than his colleague. Nevertheless, despite the differences in evaluation, they can agree on the result.

The deposition of Chairman Hartwig was the only evidence before the district court as to Board procedures and the court found that the Board only "studies and considers" but "does not adopt" (A. 210) regional board and division reports. The court held that, where neither a statement of facts and reasons nor a summary of facts and reasons is issued, (a) the reports and recommendations of a division of the Board, and (b) the reports and recommendations of a regional board, constitute "final opinions * * * made in the adjudication of cases" within the FOI Act (5 U.S.C. 552(a)(2)(A)) (A. 213–18), which must be indexed and disclosed to the public. The district court reasoned that a division report "at the very least * * * reflect[s] the analysis of one member [of the Board] and * * * thereby constitute[s] a concurring opinion" which must be made public. A. 215. The district court concluded that regional board reports constitute "final opinions" with the meaning of the Act because:

> * * * a clearance notice by itself is meaningless. In order for the public to be fully informed, the reasons behind the clearance notice must be made available and in this type of case such facts and reasons are found in the Regional Board's report. [A. 216.]

On appeal the court of appeals "agree[d] * * * with the ruling and reasoning of the District Court requiring disclosure of reports and recommendations of divisions of the Renegotiation Board and any concurrences or dissents thereto" (Pet. App. A, p. 3A, n. 2). The court of appeals also held that the district court's judgment concerning regional board reports and recommendations could be supported on two additional grounds.

The court ruled that the regional boards were "agencies" within the meaning of 5 U.S.C. 552(a)(2)(A) and that their reports to the Board could be viewed, either, as the district court held, as final opinions of the Board, or as final opinions of the regional boards, as agencies themselves. Pet. App. A, pp. 3A–13A. The court also held that Exemption 5 of the FOI Act (5 U.S.C. 552(b)(5)), covering inter-agency or intra-agency memoranda, relied upon by the Board as exempting the regional board reports from compelled disclosure, did not apply to the documents, regardless of their status as final opinions. It stated that the purposes of Exemption 5 would not be thwarted by public disclosure of "a document which a decision-maker treats as a justification for a decision communicated outside the bureaucracy to regulated parties," even though it was "originally prepared for purposes of pre-decisional consultation * * *" (Pet. App. A, p. 21A).

SUMMARY OF ARGUMENT

Regional board reports and division recommendations are not, as the courts below held, "final opinions * * * made in the adjudication of cases," subject to the compelled disclosure requirements of the FOI Act. Rather they are "intra-agency memorandums" exempt from disclosure by Section 552(b)(5) of the Act.

I

5 U.S.C. 552(b)(5) exempts from disclosure "inter-agency or intra-agency memorandums or letters

which would not be available by law to a party other than an agency in litigation with the agency." The exemption was designed to preserve the free exchange of ideas and recommendations which is an essential element of reasoned decision-making, by protecting pre-decisional, consultative documents against compelled public disclosure. The division and regional board reports at issue here clearly come within the terms and intent of that exemption.

The division reports are pre-decisional communications between decision-makers at the highest level. They are not intended to, and do not necessarily reflect, the reasons which underlie a final Board decision. Compelled public disclosure of such communications would thus not only mislead the public but would also gravely impair the decisional processes of an agency by preventing confidential communication between members of the agency. Similarly, the regional board reports are intra-agency memoranda within the meaning of Exemption 5. The regional boards, composed entirely of civil servants, possess no decisional authority in the cases at issue here. The regional board reports simply contain recommendations, together with supporting reasons, made by subordinates to their presidentially-appointed superiors. Disclosure of the regional board reports would obviously mislead the public into the mistaken belief that they contained the reasons which led the Board to a particular decision and would impair the decisional processes of the Board.

The court of appeals erroneously held that Exemption 5 is not applicable to the division and regional

board reports because they are utilized to justify a decision subsequently announced to the public. The court's ruling is contrary to the undisputed evidence that the documents are not used to justify decisions and fails to recognize that the deliberative process is impaired if consultative documents cannot be prepared with assurance of confidentiality even after a decision is reached.

II

The courts of appeals held the division reports were "final opinions" of the Board or at the least "concurring opinions," and that the regional board reports were either "final opinions" of the Board or "final opinions" of the regional boards, considered as separate "agencies" within the meaning of the FOI Act, issued in the adjudication of cases. Accordingly, the courts held that Exemption 5 was not applicable to the documents and that they were disclosable to the public pursuant to Section 552 (a)(2)(A) of the Act.

But the division reports are not "final opinions" of the Board or even "concurring opinions." The division reports are pre-decisional consultative documents which are designed to serve as bases for discussion. They are not intended to and do not function as explanations for decisions taken after discussion.

Similarly, regional board reports cannot be viewed as "final opinions" of the Board, since the reports are merely advisory recommendations submitted by civil servant employees to their superiors. The theory of the court of appeals that these advisory recommendations must be considered as "final opinions" because the Board's review of them is only "perfunctory" is con-

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trary to the undisputed evidence demonstrating extensive and independent review by the Board, and is based upon an impractical and anomalous standard which will, if adopted, chill the deliberative process and require judicial intrusion into the mental processes of the Board.

The regional board reports cannot be viewed, alternatively, as the "final opinions" of "agencies" (regional boards) possessing an identity which is separate and distinct from that of the Board. In order to fulfill its responsibilities, the Board, as any government agency, is forced to delegate some of its functions to subordinates in order to preserve the ability of the Board members to establish policy and to direct the activities of the agency. In the cases at issue here, the Board has delegated certain preliminary functions to the regional boards but has delegated no decisional authority. An interpretation of the terms "agency" and "final opinions" which subjects the recommendation of these entities to public disclosure thus severely jeopardizes the ability of superiors to delegate some functions to subordinates while retaining their ability to communicate freely with those to whom the delegation is made.

ARGUMENT

INTRODUCTION

We will argue at some length below that regional and divisional reports are "* * * intra-agency memorandums * * *" exempted by Exemption 5 (5 U.S.C. 552(b)(5)) from compelled disclosure (Point I),

rather than "final opinions," as the courts below held (Point II).[20] Preliminarily, however, we note that the court of appeals was led to characterize these documents as "final opinions" by a misconception of the FOI Act. The underlying premise of the decisions below is that, because the Board did not write formal opinions it was appropriate to treat the most proximate staff document containing recommendations followed by the Board as the Board's opinion.[21] The flaw in the premise is the assumption that all agencies must write opinions. Since the staff documents were never intended to serve as opinions, the effect of the court's approach will be to impel agencies to write formal opinions which will more accurately reflect the agencies' collective thinking and judgment.

However desirable it might be, in certain circumstances, for agencies to write opinions, it is not the office of the FOI Act to bring about such restructuring of agency procedures. When Congress has thought it

[20] We argue Exemption 5 first because the government's burden in this case would not be satisfied by demonstrating that these documents are not "final opinions": they are concededly "identifiable records" subject to disclosure under 5 U.S.C. 552(a)(3), unless they are exempt under 5 U.S.C. 552(b).

[21] Thus, the district court (whose "reasoning" the court of appeals adopted) held that a division recommendation was a final opinion because, "[i]t is in fact the last document which explains reasons for the Board's decision" (A. 215) and a regional report was a final opinion because, "[i]n order for the public to be fully informed, the reasons behind the clearance notice must be made available and in this type of case such facts and reasons are found in the Regional Board's report" (A. 216).

advisable for agencies to write opinions, it has told them directly to do so, either in the agencies' organic statutes or the Administrative Procedure Act.[22] Indeed, in those cases where Congress believed it appropriate for the Renegotiation Board to write opinions, it so provided in the Board's statute.[23]

If the FOI Act is interpreted in a way which forces agencies to write opinions, it will seriously undermine the efficiency of agencies which—because of the character and volume of their business—Congress has not required to write opinions. This point was well-stated by a different panel of the court below. In *Sterling Drug Inc.* v. *Federal Trade Commission,* 450 F. 2d 698, 707, the court spoke of "the salutary effect of requiring agencies to issue an opinion with every order," but concluded:

> Although persuasive in the abstract, this reasoning is unrealistic when applied to the everyday world of overburdened administrative agencies. Agencies are required to issue opinions with many of their orders, but it is completely unreasonable to suppose that every agency order can be accompanied by an opinion.[24]

In our view, the decision in this case will tend to have just such an "unreasonable" effect on agency action.

We proceed to a consideration of the FOI Act and the reasoning of the court below.

I. THE DIVISION AND REGIONAL BOARD REPORTS ARE EXEMPT FROM COMPELLED DISCLOSURE BECAUSE THEY ARE INTRA-AGENCY MEMORANDA WITHIN THE MEANING OF EXEMPTION 5 OF THE FREEDOM OF INFORMATION ACT.

Exemption 5 of the FOI Act (5 U.S.C. 552(b)(5)) exempts from compelled public disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." In *Environmental Protection Agency* v. *Mink,* 410 U.S. 73, 86, this Court noted that with Exemption 5, "Congress intended to incorporate generally the recognized rule that 'confidential intra-agency advisory opinions * * * are privileged from inspection'" (quoting *Kaiser Aluminum & Chemical Corp.* v. *United States,* 157 F. Supp. 939, 946 (Ct. Cl.) (Reed, J.)). Quoting further from *Kaiser,* the Court recognized (410 U.S. at 87):

[22] The Administrative Procedure Act imposes no requirement that the Renegotiation Board prepare opinions. See note 3, *supra.* Moreover, the requirement in the APA that agencies make "findings and conclusions" applies only to rule-making proceedings (5 U.S.C. 557) and only to adjudications "required by statute to be determined on the record after opportunity for an agency hearing" (5 U.S.C. 554 (a)). See *Camp* v. *Pitts,* 411 U.S. 138, 141 n. 3. The decisions of the Board at issue here do not constitute "rule-making", see 5 U.S.C. 551(5), and the Board is not required by its organic statute to render its decisions upon a record (see note 23, *infra*).

[23] 50 U.S.C. App. 1215(a) provides that when the Board issues a unilateral order determining the existence of excess profits, it shall, upon request of the contractor concerned, issue a statement of facts and reasons for its order. The Board's organic statute does not require the issuance of "opinions" in any other situation.

[24] In a footnote to the quoted language the court observed (450 F.2d at 707, n. 9):

> The Social Security Administration issues more than four million orders a year, the Bureau of Customs three million orders, the Department of Agriculture two million feed grain and wheat diversion orders, and the FCC more than one million licenses (each an order).

> There is a public policy involved in this claim of privilege for this advisory opinion—the policy of open, frank discussion between subordinate and chief concerning administrative action.

The Senate Report on the bill which became the FOI Act noted the same policy (S. Rep. No. 813, 89th Cong. 1st Sess. at 9):

> * * * it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subject to public scrutiny * * * [The] efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to "operate in a fish bowl."

See also H. Rep. No. 1497, 89th Cong., 1st Sess. 10 ("House Report").

The division and regional board reports at issue here come within both the terms and intent of Exemption 5. The documents are pre-decisional and consultative in nature and are designed solely to provide advice and counsel to the persons who have the responsibility for making decisions.

1. THE DIVISION REPORTS

Division reports are prepared by individual Board members who share ultimate responsibility for a Board decision and are addressed solely to the other Board members with whom this responsibility is shared. The documents are pre-decisional communications between decision-makers at the highest level. As such, there is a special need that their confidentiality be protected. As a different panel of the court below

observed (*Sterling Drug Inc.* v. *Federal Trade Commission, supra,* 450 F. 2d at 708):

> * * * Congress expressly indicated that intra-agency communications of thoughts and opinions are to be protected, and nowhere is that protection more needed than between the ultimate decision-makers within an agency. In most agencies the exchange of views between Commissioners or Board members is considered perhaps the most essential element in the decisional process. Thus, continual expression of ideas and strong advocacy of positions are to be encouraged to the fullest at this level.

The pre-decisional nature of division reports was repeatedly emphasized by Chairman Hartwig, whose testimony constituted the only evidence before the district court as to Board procedures. For example, the Chairman testified that the Board does not, indeed it cannot (A. 180), agree upon every facet of a report when it renders a decision. He explained that the questions before the Board are judgmental in nature, and that while Board members may disagree with an analysis that is contained in a report, they may agree with the recommended disposition contained in it. *Ibid.* As he stated:

> Many times a Board member will agree to a clearance, in this case for none of the reasons stated in the staff document. He may have his own reasons. His own assistants may have checked out some point that was bothering him, that he didn't even discuss with his colleagues. But the important thing is the informality of our procedure, whereby we all agree that we agree on the results. [A. 100].

Discussion at Board meetings is thus not limited to the reports before the Board (A. 181). Rather, the reports merely provide the basis for discussion, *ibid.*, and, as the district court specifically found, the Board either accepts or rejects the recommendations and not the reports before it. A. 210.[25]

The compelled disclosure of pre-decisional and consultative memoranda of individual members of an agency would seriously undermine its decisional process. Such disclosure would severely impair the independence and freedom of inquiry which are essential components of the administrative process. Administrators, like judicial officers, are faced with decisions involving issues which excite the "deepest feelings." *Bradley* v. *Fisher*, 13 Wall. 335, 348. The losing party in this type of case "feels most keenly the decision against him, and most readily accepts anything but the soundness of the decision [against him] in explanation of the * * * [decision]." *Ibid.* Compelled disclosure of pre-decisional documents will result in charges, no matter how unfounded, that the decision was based upon factors contained in pre-decisional memoranda even though, in fact, those factors did not form the basis for the decision.

"One must not expect uncommon courage even in * * * [administrators]." *Tenney* v. *Brandhove*, 341 U.S. 367, 377. The possibility that publicly disclosed

[25] The finding referred to speaks of regional reports, but the district court supported that finding by quoting Chairman Hartwig's description of Board action with respect to "the report of renegotiation, the reviewer's report, the Panel Division Report, et cetera * * *" (A. 180).

division reports will be seized upon as a basis for attacks upon their decisions can only lead Board members to be timid in making recommendations. This, in turn, can only lead to a consequent decline in the nature and range of alternatives considered prior to the rendering of a decision and a resultant decline in the quality of decision, cf. *Pierson* v. *Ray*, 386 U.S. 547; *Tenney* v. *Brandhove*, *supra*; *Bradley* v. *Fisher*, *supra*. As this Court recently noted:

> Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process. [*United States* v. *Nixon*, No. 73-1766, decided July 24, 1974, slip op. p. 20, (footnote omitted).]

Moreover, compelled disclosure of memoranda circulated among members of an agency would also impair the efficiency of the agency. When such disclosure is not anticipated, the author of the memorandum is responsible only for the exposition of his views in terms which can be understood and which will persuade his fellow members in his agency. Under the decision of the court of appeals, however, the author of a memorandum can no longer write solely for his fellows, but must be sensitive that he may also be explaining a subsequent decision to the public at large. He will be impelled, not simply to report his views but to assume the responsibility of justifying to the public a proposed decision of the full membership which may or may not adopt his reasoning.

Finally, the disclosure of consultative memoranda of agency members would mislead the public. As pre-decisional, consultative documents, such memoranda are not designed to provide a full explanation of the reasons for a particular agency decision to members of the public. This Court has recognized that many administrative judgments "express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions, impressions which may lie beneath consciousness without losing their worth" (*Chicago, Burlington and Quincy Ry. Co.* v. *Babcock*, 204 U.S. 585, 598).

The division reports at issue are prepared by one Board member and are addressed to his fellows, all of whom share common understandings and experiences born of their service together on the same agency charged with a specific goal. The reports are designed to be understood and are interpreted by those to whom they are addressed in light of shared perceptions and views as to broad questions of policy. Accordingly, division reports do not address the totality of issues before the Board.

Important, but agreed upon, principles and assumptions are not discussed and only certain factors are highlighted. As pre-decisional, consultative documents, division reports, therefore, do not reflect the ultimate reason for a decision but merely constitute the foundation upon which subsequent discussion among those responsible for a decision is based. They are simply a basis from which reasoned decision-making may begin. A. 180–181. Disclosure of the reports, therefore, may mislead the public into the erroneous belief

that a division report contains the full and complete reasons which underlie a Board decision when, in fact, the decision was taken for other reasons.

In sum, the division reports are protected "intra-agency" memoranda within the meaning of Exemption 5. The reports are only a part, albeit an integral part, of the decision-making process. They do not represent the final product of that process. By compelling disclosure of the division reports, the courts below have thus, in effect, compelled the Board to disclose the mental process by which it reaches its decisions, and, in so doing, they have failed to respect the "integrity" and "appropriate independence" of a "collaborative" instrumentality of justice. See *United States* v. *Morgan*, 313 U.S. 409, 422. This the courts may not do. See *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402; *United States* v. *Morgan*, *supra*; *Morgan* v. *United States*, 304 U.S. 1, 18. Cf. *Fayerweather* v. *Ritch*, 195 U.S. 276, 306–07; *Shaughnessy* v. *Accardi*, 349 U.S. 280, 290 (Black, J., dissenting).

2. REGIONAL BOARD REPORTS

Regional board reports[28] are also "intra-agency" memoranda which are immune from disclosure under

[28] As noted (*supra*, p. 5), at the time this litigation arose the "Report of Renegotiation" consisted of Part IA, prepared by the accountant, and Part II, prepared by the renegotiator. The entire report, if approved by the regional board, was signed and forwarded to the Board as the regional board's recommendation. And differences in the regional board's recommendation were reflected in addenda. Since Part IA was available to the contractor (*supra*, pp. 5–6), "regional board reports" is here used to refer to Part II of the Report of Renegotiation and any addenda by the regional board.

Exemption 5. The considerations which compel the conclusion that division reports come within the terms and intent of that Exemption apply with equal force to regional reports. Indeed, the special nature of the regional boards makes the conclusion that they are intra-agency memoranda even more compelling.

More than thirty years ago, the Attorney General's Committee on Administrative Procedure noted:

> Four of the characteristics of administrative agencies * * * are their size, their specialization, their responsibility for results, and their variety of duties. Each of these characteristics to a greater or less degree, in turn, contributes to, and necessitates, a highly important characteristic of administrative procedure: delegation. The large staff of an agency, the many duties which the agency is called upon to perform, the necessity of harmonizing its affirmative responsibility for results with its equally important duty of deciding correctly as between the parties in each particular case, and the practical need for the fullest possible utilization of its special skills and expertness—each of these calls for internal organization which involves an allocation of functions among the members and staff of the agency. [Attorney General's Committee on Administrative Procedure, Final Report, reprinted as Sen. Doc. No. 8 (77th Cong., 1st Sess.), pp. 20–21 (19)]

In this case, Chairman Hartwig testified that "[t]he Regional Boards are created in order to assist the Statutory Board in processing the large volume of cases which we receive" (A. 178). The number of cases is so great, and the nature of the cases so complex,

that the Board could not fulfill its responsibilities without delegating some preliminary tasks to subordinates.

Although the Board has created the regional boards and delegated some authority to them, the Board has surrendered none of its powers of decision in the Class A cases involved here. See 32 C.F.R. 1471.2(b) (1972), *supra*. For all practical purposes, in Class A cases, the civil servants who comprise the regional boards serve as staff personnel to the Board. They investigate; they conduct preliminary negotiations; they recommend: but they do not decide.

The delegation of tasks which the Board has found necessary to the effective performance of its functions would be of limited value if the Board were unable to consult freely and openly with those to whom it has made the delegation. See *Environmental Protection Agency* v. *Mink, supra*. Since the regional board reports represent recommendations of subordinate staff civil servants to their presidentially appointed superiors, permitting compelled public disclosure of those reports would substantially impair the value of the delegation. As the Court of Claims noted in *Kaiser Aluminum & Chemical Corp.* v. *United States, supra*, 157 F. Supp. at 945–946 (Reed, J.):

> Free and open comments on the advantages and disadvantages of a proposed course of governmental management would be adversely affected if the civil servant or executive assistant were compelled by publicity to bear the blame for errors or bad judgment properly chargeable to the responsible individual with power to decide and act.

Disclosure of the regional board reports at issue here would thus violate both the terms and the intent of Exemption 5. The regional board reports are merely recommendations by subordinate staff civil servants and are addressed to their superiors, presidential appointees, who possess the sole power of decision. These superiors utilize the staff reports solely as the basis for discussion. While the Board may agree with the recommendations contained therein, as the district court specifically found, A. 210, the Board does not adopt the reports.

Compelled disclosure of regional board reports would therefore force the Board to "operate in a fishbowl" and impair its decisional processes in violation of the intent of Exemption 5.

3. THE COURT OF APPEALS ERRONEOUSLY HELD THAT AN INTRA-AGENCY MEMORANDUM LOSES ITS EXEMPTION WHEN IT IS TREATED BY AN AGENCY AS A "JUSTIFICATION FOR A DECISION"

The court of appeals held that, even if regional board reports are pre-decisional and consultative in nature, they would lose their exemption under certain circumstances. The court of appeals stated the test for the application of Exemption 5 as follows (Pet. App. A, p. 21A):

> [A] document which a decision-maker treats as justification for a decision communicated outside the bureaucracy to regulated parties should not be shielded from public disclosure on the ground that it was originally prepared for purposes of pre-decisional consultation * * *.

Concluding that regional board reports "clearly reflect and are used to justify decisions of the Regional Board communicated to the contractors under scrutiny," the court held that they had lost any exempt status they might have enjoyed (*ibid.*).

The court's analysis is contrary to the undisputed evidence in the record and seriously misinterprets the purpose of Exemption 5. In the first place, the only relevant evidence in this case conclusively demonstrates that the Board does not treat either division reports or regional board reports as justifications for its decisions (*supra*, pp. 14–15). The court of appeals' assumption that the Board adopted the reasoning of the reports is contrary to the undisputed evidence. Its conclusion that disclosure of the reports after decision will not impair the decisional process is, therefore, erroneous.

Whether the pre-decisonal consultative document is disclosed before or after a decision is rendered or whether the decision ultimately accords with the recommendation contained in the advisory memoranda is not significant. The important factor is whether the author of a document can prepare the document with confidence that it will not be made public. If he can be confident that it will not be subjected to public disclosure, the document can be frank and candid. It can be imaginative and it can be tentative.

If, however, the author is aware that the document may be subjected to compelled disclosure after the decision is rendered (if the decision ultimately reached

accords with his recommendation), the ability to be open and candid in the original document is destroyed. The policy underlying Exemption 5, therefore, requires that internal deliberative documents be protected from compelled disclosure even after the final decision is rendered and even though that decision ultimately accords with the recommendation contained in the advisory memoranda.

II. THE DIVISION AND REGIONAL BOARD REPORTS ARE NOT FINAL AGENCY OPINIONS ISSUED IN THE ADJUDICATION OF CASES.

If, as we have argued, the regional board reports and division recommendations are intra-agency memoranda within the meaning of Exemption 5, they cannot be "final opinions, including concurring and dissenting opinions * * *, made in the adjudication of cases" within the contemplation of Section 552(a)(2)(A) of the FOI Act (5 U.S.C. 552(a)(2)(A)). Indeed, the court of appeals itself described the two sections as "mutually exclusive" (Pet. App. A, p. 12A). It approached the case from the other direction, however; it first held that reports are final agency opinions, and then concluded that as such they cannot be exempt inter-agency or intra-agency communications.

The Act, however, provides that it "does not apply" to matters covered by any of the exemptions. If, as we have shown, the reports are covered by Exemption 5, the disclosure and other requirements of the FOI Act are expressly inapplicable, and whether the reports are final agency opinions is irrelevant. However,

since the court of appeals approached the problem from the opposite direction, we now show that the reports are not "final [agency] opinions * * * made in the adjudication of cases" within the meaning of the FOI Act.

1. THE DIVISION REPORTS ARE NEITHER "FINAL OPINIONS" NOR "CONCURRING OPINIONS" OF THE BOARD.

The court of appeals affirmed the district court's holding that a division report is a "final opinion" of the Board or "at the very least * * * reflects the analysis of one member [of the Board] and * * * thereby constitute[s] a concurring opinion," Pet. App. A, p. 3A n. 2; A. 215, within the meaning of 5 U.S.C. 522(a)(2)(A). These rulings are erroneous.

Final and concurring opinions are written to explain the reasons for a particular decision. When read together with a majority opinion and a dissenting opinion, if any, a concurring opinion provides a full exposition of the factors considered by those who have rendered the decision and a full explication of their reasons for adopting a particular course of action.

As we demonstrated above, *supra*, pp. 24–29, division reports are pre-decisional communications between decision-makers at the highest level. Division reports, unlike final opinions, do not contain, and are not intended to contain, a full exposition of the reasons which form the basis for a Board decision. A. 180–181. Moreover, division reports, unlike concurring opinions, are not designed to be read with a majority opinion. These reports merely reflect the preliminary

views of a portion of the Board—views which may change as the result of discussion by the full Board. *Ibid.* The compelled public disclosure of these documents will thus not only impair the decisional process of the Board, *supra,* pp. 26–27, but will also mislead the public into the mistaken belief that a division report reflects the true basis for a Board decision. *Supra,* pp. 28–29.

2. REGIONAL BOARD REPORTS

The court of appeals held that the regional board reports could be viewed either as "final opinions" of the Board or as "final opinions" of the regional boards themselves, which it viewed as "agencies" which are separate and distinct from the Board. Pet. App. A, pp. 6A–12A. Neither ruling is correct.

a. The regional board reports are not final opinions of the Board.

As we have shown, *supra,* pp. 29–32, the regional board reports are not "final" opinions of the Board. Relying on the testimony of Chairman Hartwig (A. 180–181), the district court stated (A. 210):

> It is important to note that in no case does the Board formally adopt reports or recommendations of either the Regional Boards or its staff. It studies and considers but it does not adopt.

The regional board reports are staff-prepared documents addressed to superiors which are advisory in nature and serve as bases for discussion and decision. See pp. 29–32, *supra.* Moreover, as Chairman Hartwig

made clear, the reports cannot be assumed to reflect the reasons for a Board decision, simply because that decision is in accord with the recommendation contained in the report: each member may have his own (and different) reasons for agreeing with the recommendation (A. 180–181).

The court of appeals reasoned that the reports should be viewed as "final decisions" of the Board because of the "perfunctory nature" of the Board's review of regional board reports. Pet. App. A, pp. 4A–5A. The only evidence in the record, however, shows that the Board's review of the reports is anything but "perfunctory."

Chairman Hartwig testified (A. 78–79) that before the Board considers a report, the file is reviewed by both the Board's Office of Accounting and Office of Review; that the Director of the Office of Review prepares a recommendation to the Board concerning the regional board report; and that all of the recommendations are submitted to individual Board members, each of whom conducts an independent study and each of whom may direct his own assistant to conduct a study. A. 79. It is only after this extensive and exhaustive procedure that the Board begins its formal consideration of the case.

In any event, there is no reason why pre-decisional advisory memoranda should lose their confidentiality because a reviewing court concluded that the agency superior to whom the reports are submitted gives the memoranda only "perfunctory" review. The openness and candor of the staff member who prepares the recommendation would be seriously impaired if the con-

fidentiality of the recommendation were to depend upon a judicial evaluation of how comprehensive the agency review had been. Indeed that ground for decision constitutes an impermissible intrusion by the judiciary into the internal mental processes of an agency. See *United States* v. *Morgan*, and other cases cited at p. 29, *supra*.

b. The regional boards are not "agencies" under the FOI Act whose recommendations are "final opinions."

Section 552(a)(2)(A) of the FOI Act requires each "agency" to make its "final opinions" available to the public. The court of appeals held (Pet. App. A, pp. 5A–13A) that even if the regional board reports are not "final opinions" of the Board, they are the "final opinions" of the regional boards themselves, which the court viewed as "agencies" which are separate and apart from the Board itself.

But, as we have demonstrated, pp. 5–8, 29–32, *supra*, the regional boards in Class A cases are composed of civil service staff personnel to whom their superiors have delegated the function of investigation and recommendation. They have, in Class A cases, no power of decision. 32 C.F.R. 1471.2(b) (1972). The record thus refutes the court's conclusion that the recommendations of regional boards are "agencies" within the meaning of the FOI Act whose recommendations must therefore be viewed as "final opinions."

Moreover, that view would jeopardize the effective and efficient operation of statutory agencies which must delegate some of their preliminary functions to staff personnel in order to fulfill their responsibilities.

As we have noted, *supra*, p. 30, delegation is an inherent characteristic of government agencies. Without the power of delegation, agency heads would be unable to fulfill their primary functions of "direction and supervision." Attorney General's Committee on Administrative Procedure, *supra*, Sen. Doc. No. 8, at p. 21. Agencies with a large volume of matters before them could not review even a fraction of the cases which come before them each year without the ability to delegate at least some preliminary details. But the value of such delegation would be severely undercut if subordinates were inhibited from making frank and candid recommendations by a concern that their recommendations would be subject to compelled public disclosure.

Under the court of appeals decision, however, whenever, as here, presidentially-appointed superiors delegate some of their functions, but not their power of decision, to subordinates, the result may be the creation of a new "agency" within the meaning of the FOI Act. The result would seriously weaken the superiors' ability to consult with their subordinates in the manner which is required to provide sound decision-making.[27] Such a result is contrary to the

[27] See *Washington Research Project, Inc.* v. *Department of Health, Education and Welfare*, 366 F. Supp. 929, 935, appeal pending, C.A.D.C. No. 74-1027, where the district court held, on the authority of the court of appeals decision in this case, that advisory recommendations of committees composed of scientists employed as consultants by the Department of Health, Education and Welfare to review biomedical research grant applications for scientific merit were "final opinions" of "agencies" within the meaning of the FOI Act.

traditional understanding of what constitutes an "agency", finds no support in the terms or legislative history of the FOI Act, and seriously impairs the ability of agencies to make essential delegations of functions.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

The provisions of the Freedom of Information Act (5 U.S.C. 552) are as follows:

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance, with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

(4) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(b) This section does not apply to matters that are—

(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

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